Supreme Court, U.S.
FILED
JAN 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-685

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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IN RE AIR CRASH DISASTER AT MANNHEIM, GERMANY ON SEPTEMBER 12, 1982
MDL-555

CHERYL ANN ESCHLER, *et al*,
*Petitioner*,

v.

THE BOEING COMPANY,
*Respondent*.

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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# REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF OF CHERYL ANN ESCHLER, ET AL.

### ARGUMENT

### I.

In its statement of the case, Boeing complains that the District Court improperly applied Pennsylvania's "consumer products liability law". Respondent's Reply Brief, p. 5. Boeing argues that Pennsylvania has a separate government contractor defense law which the Third Circuit did apply. This position conflicts with the Third Circuit's decision in *Brown v. Caterpillar Tractor Co.*, 741 F.2d 656, which held Sec. 402A to be applicable. *Brown,* 659-661.

Simultaneously Boeing claims the Third Circuit's decision does not conflict with any other circuit court decision and in any event, it argues, which law applies is irrelevant. While the Third Circuit stated flatly it was applying Pennsylvania law, on the basis of its diversity jurisdiction, *In Re Air Crash Disaster at Mannheim, Germany,* 769 F.2d 115, 120, the Fifth Circuit, in *Bynum v. FMC Corp.*, 770 F.2d 556 (1985) called for an analyses to weigh the existence of a federal interest and whether "federal common law or state law" should be the applicable federal rule. *Bynum* at pp. 567-568.

The Third Circuit made no such analysis. These varying approaches create questions of what standards should be applied to the application of the government contractor defense; i.e. (a) what is "compulsion" and when it should be considered; (b) whether there is a "known or should have known"

duty to warn, similar to that applied in *In re Agent Orange Product Liability Litigation,* 597 F.Supp. 740, 749 (E.D.N.Y. 1984) and when it is applicable. *Bynum, supra,* at 576, n. 29; (c) whether and to what extent a state's consumer product liability law is applicable as applied by the Third Circuit in *Brown v. Caterpillar Tractor Co.,* 741 F.2d at 659-661. Also see Schoenborn Petition, p. 14–19.

Thus the different approaches by the different circuit courts, which is conceded by Boeing to exist, Respondent's Brief, p. 11, results in the application of different standards. This petition raises these important issues which, if there is a government contractor defense which will continue to be applied, should be resolved by this Court.

## II.

Boeing attempts to sidestep the Third Circuit's faulty application of the separation of powers principle to foreign plaintiffs (Eschler Petition, Point II) by arguing that because the accident occurred in West Germany the claims of the foreign plaintiffs were barred by the provisions of 28 U.S.C. 2680(k)(no jurisdiction for claims arising in a foreign country), Respondent's Brief, p. 9, and then claiming that the Third Circuit defeated these claims under Pennsylvania government contract law, and not because of the application of the "separation of powers" principle. Respondent's Brief, p. 13.

Respondent's argument ignores the facts and the law. Under the Federal Tort Claims Act, a tort claim arises at the place where the negligent act or omission occurs, and not where the negligence has its "operative effect" (i.e. the situs of the injury). 28 U.S.C.

1346(b); *Richards v. United States,* 369 U.S. 1 (1962); *United States* v. *Spelar,* 338 U.S. 217 (1949); *Broadnax* v. *United States Army,* 710 F.2d 865 (D.C. Cir. 1983).

During the trial Boeing's contended that the negligence of the government during the transmission overhaul in Texas was the proximate and superseding cause of the accident. If true, such a claim was actionable against the United States and was not barred because the accident occurred in Germany. The jury defeated Boeing's claim. P. App. E, Item 3.

Boeing's gratuitous reference to the NATO-SOFA agreement (Respondent's Brief, p. 10) is irrelevant. If applicable at all, it would pertain only to the United States. Boeing cites no case whereby NATO-SOFA restricts claims against a manufacturer.

In dismissing the claims of the foreign plaintiffs, the Third Circuit completely avoided any discussion related to the nonapplication of the *Feres/Stencil* doctrine to these plaintiffs, who were not servicemen, but blindly applied the separation of powers principle contrary to this Court's prior applications in *Stencil Aero Engineering Corp. v. United States,* 431 U.S. 66 (1977) and in *United States v. Shearer,* 473 U.S. ___, 87 L.Ed.2d 38 (1985).

## CONCLUSION

The government contractor defense, if it remains a viable defense, immunizing contractors who receive billions of taxpayer dollars, should be reviewed to determine if, when and how it is to be applied, and if it is to be applied, to set comprehensible and consistent standards. The petition should be granted.

Respectively submitted

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